NO. 07-19-00082-CR

In the

Court of Appeals

SEVENTH DISTRICT OF TEXAS
Amarillo, Texas

TERRY MARTIN,

Appellant

Versus

THE STATE OF TEXAS,

Appellee.

Appeal from Cause No. 2019-494,736 in the
County Court at Law 2, Lubbock County, Texas
Honorable Drue Farmer, Judge Presiding

BRIEF FOR APPELLANT

Oral Argument Requested

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Constitutional Provisions, Codes, and Rules

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TO THE HONORABLE COURT OF APPEALS:

Appellant, TERRY MARTIN, files this brief challenging the constitutionality of Texas Penal Code section 46.02(a-1)(2)(C) both facially and as applied to Appellant as it criminalizes otherwise lawful behavior and unjustly restrains several constitutional rights. Even if constitutional under the Fourteenth Court of Appeals' holding in *Ex Parte Flores*, Appellant contends the evidence was legally insufficient to support his conviction.

STATEMENT OF THE CASE

On January 8, 2019, the State charged Appellant by information with unlawful possession of a weapon pursuant to Section 46.02 of the Texas Penal Code. (CR 13-14). The case proceeded to trial on January 28, 2019, and the jury returned a verdict of guilty. (CR 54). The jury then assessed punishment at zero days in jail, a fine of $400, and court costs of $282 on January 31, 2019 (CR 54). On February 6, 2019, Appellant filed a Motion for New Trial alleging the verdict was contrary to the law and evidence. (CR 73). The trial court ultimately denied the motion for new trial and this appeal is now properly and timely before this Court.

STATEMENT ON ORAL ARGUMENT

The constitutionality of Texas Penal Code section 46.02(a-1)(2)(C) is an issue of first impression for this Court. Counsel notes there is at least one other case pending before this Court that raises the same issue: Becker v. State, No. 07-19-00286-CR. Just as the appellant in that appeal challenges the constitutionality of the unlawful carry statute and criticizes the wrong conclusion reached by the Fourteenth Court of Appeals on this issue, so does Appellant here. Oral argument would aid the Court by exploring the critical constitutional dangers created by this statute.

ISSUES PRESENTED

Issue One: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code is unconstitutional on its face under the Fourteenth Amendment's Equal Protection Clause.

Issue Two: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code is unconstitutional on its face under the First and Fourteenth Amendments because it impairs the right to association.

Issue Three: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code is unconstitutional on its face under the First and Fourteenth Amendments because it authorizes state action based on the doctrine of guilt by association.

Issue Four: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code is unconstitutionally overbroad on its face under the First and Fourteenth Amendments.

Issue Five: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code violates on its face the fundamental right to travel under the Fourteenth Amendment's Due Process Clause.

Issue Six: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code is unconstitutional on its face under the Second and Fourteenth Amendments.

Issue Seven: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code is unconstitutionally vague on its face under the Fourteenth Amendment's Due Process Clause.

Issue Eight: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code is unconstitutional as applied to Appellant under the Fourteenth Amendment's Equal Protection Clause.

Issue Nine: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code is unconstitutional as applied to Appellant under the First and Fourteenth Amendments because it impairs his rights to association and expression.

Issue Ten: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code is unconstitutional as applied to Appellant under the First and Fourteenth Amendments because it authorizes state action against him based on the doctrine of guilt by association.

Issue Eleven: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code is unconstitutionally overbroad as applied to Appellant under the First and Fourteenth Amendments.

Issue Twelve: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code violates Appellant's fundamental right to travel under the Fourteenth Amendment's Due Process Clause.

Issue Thirteen: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code as applied to Appellant violates his rights under the Second and Fourteenth Amendments.

Issue Fourteen: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code is unconstitutionally vague as applied to Appellant under the Fourteenth Amendment's Due Process Clause.

Issue Fifteen: Even applying the erroneous statutory interpretation by *Ex Parte Flores*, the evidence is legally insufficient to support Appellant was one of the members or per-sons who regularly or continuously engaged in criminal activity.

STATEMENT OF FACTS

On April 17, 2018, Appellant Terry Martin was stopped on his motorcycle on US Highway 87 in Lubbock County for travelling higher than the posted speed limit and for a partially obscured license plate, among other alleged traffic violations. (3 RR 14-15); State's Exhibit 1. He was then arrested for unlawful carrying of a weapon because the arresting officer deemed him to be a member of the Cossacks motorcycle club and considered that club a criminal street gang. (CR 6-12).

Though the charges were dismissed, police had previously arrested Appellant in McLennan County for the engaging in organized crime in 2015. (3 RR 139-145; 6 RR 23); State's Exhibit 6. A later report from the Waco Police Department revealed that police ran a background check and did not find anything that would prohibit Appellant from legally possessing a handgun. (3 RR 142-45). The Waco Police Department returned Appellant's gun to him. (3 RR 146). Other than this police report, the State introduced no evidence of any prior conviction or criminal activity involving Appellant. (5 RR 51-71). Appellant, in fact, had no criminal record.

SUMMARY OF THE ARGUMENT

Under Section 46.02(a-1)(2)(C) (Unlawful Carrying Weapons) of the Texas Penal Code, the police may arrest any otherwise lawful handgun owner whenever the police consider that licensee to be a member of a "criminal street gang." Appellant challenges the constitutionality of the statutes both specifically and in their totality, facially and applied to Appellant. Appellant argues that the statutory provisions deny Appellant his rights under the First, Second and Fourteenth Amendments.

The statutory law offends the vagueness doctrine under the Due Process Clause by permitting arbitrary enforcement of the meanings of "member" of a "criminal street gang." The statutes permit police to arrest otherwise lawful handgun owners under the condemned rationale of guilt by association, a basis of discrimination forbidden by both the First and Fourteenth Amendments.

By subjecting all lawful handgun owners like Appellant to arrest and prosecution, Texas law deprives them of their First and Fourteenth Amendment liberties. Specifically, these liberties include the right to associate, to express that association, and to travel. It also infringes upon

an otherwise lawful handgun owner's ability to exercise these rights simultaneously. By reaching these First Amendment rights, individually and collectively, the statutory framework is unconstitutionally overbroad.

Lawful handgun owners like Appellant also have a Second Amendment right to carry their handgun for defensive purposes. The Legislature has enacted a law authorizing eligible law-abiding persons to carry handguns for defensive purposes in their vehicles. Section 46.02(a-1)(2)(C) plainly contravenes these rights bestowed upon law-abiding handgun owners.

The statute's plain language explicitly authorizes police to disarm and arrest any handgun owner if it considers the person to be a member of a "criminal street gang."

As applied to Appellant, the statute authorized the arrest, prosecution, and ultimate conviction of Appellant who had no criminal history and who was unaware that the Cossacks Motorcycle Club was considered a criminal street gang until his arrest. Even applying the erroneous holding in *Ex Parte Flores*, Appellant was not one of the members or persons who regularly or continuously engaged in criminal activity and no evidence in the record sufficiently demonstrates this.

STANDARD OF REVIEW AND RULES OF STATUTORY CONSTRUCTION

Whether a statute is facially unconstitutional is a question of law which is reviewed *de novo*. *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). In a facial challenge to a statute's constitutionality, the claimant asserts that the complained-of law operates unconstitutionally in all of its potential applications. *Estes v. State*, 546 S.W.3d 691, 697-98 (Tex. Crim. App. 2018). In a facial challenge, the Court considers the statute only as it is written, rather than how it operates in practice. *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 908 (Tex. Crim. App. 2011). Conversely, in an as-applied challenge, the claimant "concedes the general constitutionality of the statute, but asserts that the statute is unconstitutional as applied to his particular facts and circumstances." *Estes*, 546 S.W.3d at 698 (quoting *Fine*, 330 S.W.3d at 910).Under either type of challenge, the reviewing court begins with the presumption that the Legislature acted both rationally and validly in enacting the law under review, and the burden rests upon the individual challenging the statute to establish its unconstitutionality. *Estes*, 546 S.W.3d at 698; *see also Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002).

To construe the interplay between Section 71.01(d) and its appearance in Section 46.02, this Court looks to the statutory language and reads it contextually and under ordinary rules of grammar to ascertain legislative meaning and purpose. *Lopez v. State*, 253 S.W.3d 680, 685 (Tex. Crim. App. 2008). It is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993); Scalia, *A Matter of Interpretation* 37 (1997) (stating "context is everything" in textual interpretation).

If the language is unambiguous, the Court is obliged to construe it consistent with its clear meaning, unless the language would counter or frustrate the legislative purpose. *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). If the language is ambiguous, then it must construe the statute to give effect to its legislatively intended meaning. *Yazdchi v. State*, 428 S.W.3d 831, 837-38 (Tex. Crim. App. 2014). Before considering whether the statutory language is constitutional, the construing court must first determine its purpose and meaning, whether ambiguous or not.

While a court "may permissibly consider public policy in construing the intent of the Legislature from an ambiguous provision, [it] cannot rewrite or [. . .] deconstruct a plainly worded statute because [it] believe[s] it does not effectuate sound policy." *Tijerina v. City of Tyler*, 846 S.W.2d 825, 828 (Tex. 1992). The reason for this judicial restraint was more fully explained by the Court of Criminal Appeals:

> Although a Texas court has a duty to employ, if possible, a reasonable narrowing construction to avoid a constitutional violation, such a construction should be employed only if the statute is readily susceptible to one. We may not rewrite a statute that is not readily subject to a narrowing construction because such a rewriting constitutes a serious invasion of the legislative domain and would sharply diminish the legislature's incentive to draft a narrowly tailored statute in the first place. A law is not readily subject to a narrowing construction if its meaning is unambiguous. We should be wary of reading into a statute a narrow meaning not supported by its language because such a construction may later be rejected as untenable. Moreover, when the statute is unambiguous, the public at large will not necessarily be on notice that the law means something other than exactly what it says. Instead, we should act in accordance with our usual rules of statutory construction and construe a statute in accordance with unambiguous language absent a finding of absurd results.

State v. Johnson, 475 S.W.3d 860, 872 (Tex. Crim. App. 2015) (construing plain statutory language with an "unambiguously broad command" ultimately found to be unconstitutional) (internal quotations and citations omitted). In short, a reviewing court (1) first discerns the meaning and purpose of a statute, then (2) after having construed the statute, determines its constitutionality without effectively editing the statutory language. This order of judicial review is crucial to the constitutional scheme of government and the separation of powers.

ARGUMENT

Before delving into each of the issues raised by Appellant, it is important to note the statutes at issue in this case and the improper conclusion drawn by the Fourteenth Court of Appeals in *Ex parte Flores*, 483 S.W.3d 632 (Tex. App.—Houston [14th] 2015, pet. ref'd), when it interpreted the statutory construction of sections 46.02(a-1) and 71.01(d) of the Texas Penal Code. Section 46.02(a-1) provides in pertinent part:

> (a-1) A person commits an offense if the person intentionally, knowingly, or recklessly carries on or about his or her person a handgun in a motor vehicle or watercraft that is owned by the person or under the person's control at any time in which:

> (1) the handgun is in plain view, unless the person is licensed to carry a handgun under Subchapter H, Chapter 411, Government Code, and the handgun is carried in a shoulder or belt holster; or
>
> (2) the person is:
>
> > (A) engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic or boating;
> >
> > (B) prohibited by law from possessing a firearm; or
> >
> > (C) a member of a criminal street gang, as defined by Section 71.01.

Section 71.01(d) defines "criminal street gang" as:

> [T]hree or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities.

The *Flores* court rewrote sections 42.06(a-1)(2)(C) and 71.01(d). *Flores* declared that "a gang 'member' must be one of the three or more persons who continuously or regularly associate in the commission of criminal activities." *Ex parte Flores*, 483 S.W.3d at 645. "Member" is undefined by statute and the plain language of the statutes does not directly equate

the term "member" in 42.06(a-1)(2)(C) with the term "persons" in 71.01(d). Under *Flores*, neverthleless, the statute now reads:

> "Criminal street gang" means only those people who are members of a group with a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities, so long as the group has members at least three in number. All other members of the same group who are not among the three or more persons who continuously or regularly associate in the commission of criminal activities are excluded from this definition.

This strained interpretation violates basic rules of statutory construction by drafting a new statute and disregarding the plain and ordinary meaning of the term "member." *See United States v. Reese*, 92 U.S. 214, 221 (1875) (holding courts cannot "introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only[,]" because to do so "would be to make a new law, not to enforce an old one."); *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008) (holding courts must "presume the Legislature included each word in the statute for a purpose, and that words not included were purposefully omitted.") (internal quotations omitted).

Flores bases its limiting interpretation on a "participial phrase" which does nothing to support its conclusion that the statute somehow

spares some gang participants/affiliates (not "members") from its reach. *Ex parte Flores*, 483 S.W.3d at 644. In doing so, it seems to hold inadvertently that gang "members" are only considered "members" when they are one of the three persons who commit crimes. Yes, "persons" is plainly modified by "having a common identifying sign or symbol or an identifiable leadership." *Id.* No, "persons" does not mean "leadership," because to make that equation would make the sentence read "leadership [. . .] associate," which is a subject-verb grammatical crime. *Id.* Thus, the phrase "who continuously or regularly associate in the commission of criminal activities" must refer only to the "persons" in the statute, a construction leaving this interpretation grammatically crime-free, and counsel for Appellant in merry agreement with its final and pointless linguistic analysis. *Id*.

But this definition of the group does nothing to define what it is to be a "member" under section 42.06(a-1)(2)(C). Flores's "analysis" never supports its conclusion that "criminal street gang" means something other than the entire self-identified group. Flores ignores the fact that this broad definition is constitutionally restricted under chapter 71, but unconstitutionally unrestricted under Section 46.02.

The actual meaning of 71.01(d) is as broad as its language self-evidently reflects. It does describe any identifiable group that is three or more in number, thereby reaching organized crime involving as few as three people. Any group greater than two members triggers chapter 71 with all its prosecutorial advantages, as lawmakers undoubtedly intended.

This definition works perfectly well in prosecutions under chapter 71 where membership or affiliation with a "criminal street gang" is ancillary to a crime that a defendant has already committed. For example, under Section 71.02, a person commits an offense when, as a member of a criminal street gang, he acts with criminal intent to commit the various offenses specified by the Legislature. Tex. Penal Code, § 71.02(a). *Flores* is correct that the people who are criminally liable under Section 71.02 are only those three or more specific individuals (and no one else) identified in any indictment identifying them for engaging in criminal activity. But this limitation is true only in the chapter 71 context. This workable scheme collapses when the same definition is used as a stand-alone in a foreign statute like section 46.02.

Without its original statutory moorings, the definition's broad reach remains, but without any 71.02 restraint. Unlike 71.02, there is no language in section 46.02 which narrows this expansive language to specified criminal offenses by identified defendants. For otherwise lawful handgun owners, the definition in 46.02 literally and plainly defines criminal liability all by itself. No judge can remedy this language without legislating from the bench.

Despite the Legislature's intent and purpose, its statutory provisions have unfortunately created a mechanism for the denial of handgun owners' rights, rendering it unconstitutional on its face and in its application. This Court should grant Appellant the full relief these rights demand.

FACIAL ISSUES

I. Issue One: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code is unconstitutional on its face under the Fourteenth Amendment's Equal Protection Clause.

The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States forbids States to deny any person the equal protection of the laws. U.S. Const. amend. XIV. This Clause guarantees that "all persons similarly situated should be treated alike." *City*

of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). In this case, certain law-abiding handgun owners are treated differently than other law-abiding handgun owners based solely on the owner's association with a particular group disfavored by law enforcement, regardless of whether that handgun owner has been involved in any criminal activity due to his membership in that group.

State action is presumed to be valid if its treatment of similarly situated persons is reasonably related to a legitimate state interest. *Estes v. State*, 546 S.W.3d 691,697 (Tex. Crim. App. 2018) (state action "upheld if it is but 'rationally related to a legitimate state interest.'" *City of Cleburne*, 473 U.S. at 439. Under this rational basis test, the State need do little more than establish the reasonableness of its action. However, this presumption of validity evaporates where the unequal treatment "impinge[s] on personal rights protected by the Constitution." *Id.* (quoting *City of Cleburne*, 473 U.S. at 439). In those circumstances, the reviewing court applies a strict scrutiny test which reverses the presumption: the court presumes State action to be invalid "unless it is supported by sufficiently important state interests and is closely tailored to effectuate

only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1975) (strict scrutiny review applies to violations of fundamental rights). Appellant argues under both standards of review but asserts that strict scrutiny is the proper test to be applied here. The fundamental rights involved are detailed *infra*, but incorporated here by reference in order to avoid unnecessary repetition.

A. Disarming lawful handgun owners who have not committed crimes and who are not otherwise disqualified from owning a handgun is not reasonably related to promoting public safety.

The State action of arresting lawful handgun owners who are merely associated with a scorned group is not rationally related to the State interest in disarming criminals. Arresting and prosecuting a handgun owner who has not committed crimes merely for his association with a broadly defined "criminal street gang" does nothing to improve public safety. *See, e.g.*, *Elfbrandt v. Russell*, 384 U.S. 11, 17 (1966) (invalidating statute against members of a group because "those who join an organization but do not share [any illegal purpose] surely pose no threat[.]"). Lawful handgun owners who do not and have not engaged in criminal activity, even those who are members of a group shunned by law enforcement,

pose no threat. The state action in this case does nothing to advance the state interest in keeping guns out of the hands of criminals. On the contrary, it takes guns out of the hands of law-abiding persons who are fully qualified to purchase a handgun.

B. The statutory framework does not survive strict scrutiny because disarming lawful handgun owners is not narrowly tailored to advance the state's interest in public safety.

When a statute's disparate treatment of law-abiding individuals impairs fundamental rights, the reviewing court applies more rigorous scrutiny. *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) ("only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting [fundamental] freedoms.") (citing *NAACP v. Button*, 371 U.S. 415, 438 (1963)). Under this review, the State bears the burden of demonstrating that its discrimination of similarly situated people advances a compelling state interest by employing the least restrictive method to vindicate that interest. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) (holding it is incumbent upon the State "to demonstrate that no alternative forms of regulation would combat such abuses without infringing" on fundamental rights.); *State v. Doyal*, PD-0254-18, 2019 WL 944022, at *46 (Tex. Crim. App. Feb. 27, 2019), *reh'g*

denied (June 5, 2019) (applying strict scrutiny test to Open Meetings Act). "If a less restrictive means of meeting the compelling interest could be at least as effective in achieving the legitimate purpose that the statute was enacted to serve, then the law in question does not satisfy strict scrutiny." *Id.* (internal citations and quotations omitted). The State must also identify and demonstrate "a direct causal link between the restriction imposed and the injury to be prevented." *Id.* The State has multiple less-restrictive options, including only disarming handgun owners if that handgun owner has committed a crime pursuant to his or her membership in a gang. Disarming lawful handgun owners who commit no offense or act with criminality is not a narrowly-tailored method of promoting any State interest be it legitimate or compelling.

The least restrictive means to disarm criminals is to have a clear law that directly disarms *criminals* and discourages the use of handguns in the commission of crimes. Texas already has these laws in place. Section 46.04 of the Texas Penal Code declares it a crime for certain persons with convictions to possess firearms. Tex. Penal Code § 46.04. Section 46.02 criminalizes the carrying of a handgun in a vehicle while engaged in criminal activity. Tex. Penal Code § 46.04(a-1)(2)(B). Texas has long

discouraged possession of handguns by enhancing punishment should any person, handgun licensees included, exhibit or use such a weapon during a criminal act. Tex. Gov't Code, § 508.145 (c) & (d)(1)(B) (holding an inmate with deadly weapon finding must serve 35 years or one half the sentence); Tex. Penal Code § 20.04 (aggravated kidnapping); § 22.02(a) & (b) (aggravated assault); 22.021 (a)(2)(A)(iv) (aggravated sexual assault); § 29.03(a)(2) (aggravated robbery). None of these alternative measures impinges upon fundamental constitutional rights. *Boos v. Barry*, 485 U.S. 312 (1988) (striking down an ordinance as unconstitutional because a less restrictive alternative was readily available). The aforementioned provisions demonstrate the availability of the less restrictive alternatives to the current statute. Accordingly, this Court should hold that Section 46.02(a-1)(2)(C) violates the Equal Protection Clause and grant relief.

II. Issue Two: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code is unconstitutional on its face under the First and Fourteenth Amendments because it impairs the right to association.

III. Issue Three: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code is unconstitutional on its face under the First and Fourteenth

Amendments because it authorizes state action based on the doctrine of guilt by association.

Appellant has a right to association under the First Amendment and under the Fourteenth Amendment's Due Process Clause. U.S. Const. amend. I & XIV; *Roberts v. United States Jaycees*, 468 U.S. 609, 617-19 (1984) (holding freedom of association is protected under First Amendment); *Healy v James*, 408 U.S. 169, 186 (1972) (holding freedom of association is implicit in freedoms of speech, assembly and petition); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958) (holding freedom of association "is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."). Because the statutory definition of 71.01(d) criminalizes Appellant's status as a member of his motorcycle club when construed with 46.02(a-1)(2)(C), it violates his right to free association and declares him guilty by reason of his choice of association. This Court should therefore declare section 46.02(a-1)(2)(C), unconstitutional on its face and grant relief.

Section 46.02 acts as an unconstitutional statutory codification of guilt by association. By its plain terms, anyone who is a "member" (a term which is undefined) of a group which has at least three "persons" who

have "a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities" automatically becomes a criminal who is disqualified from owning a handgun. It does not matter that the person has committed no criminal offense. It does not matter if he is perfectly law-abiding. It does not matter if he has no idea that three members of his association regularly engage in criminal activity. It does not matter if only three members of the association engage in criminal activity while the other 97 do not. The statute condemns his handgun possession merely because of association.

Under American law, "guilt is *personal*." *Scales v United States*, 367 U.S. 203, 221-22 (1961) (emphasis added). "[G]uilt by association remains a thoroughly discredited doctrine[.]" *Uphaus v. Wyman*, 360 U.S. 72, 79 (1959). Consequently, "guilt by association" "is an impermissible basis upon which to deny" Appellant his rights to freely associate and remain free from this doctrine. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932 (1982) ("[G]uilt by association is a philosophy alien to the traditions of a free society and the First Amendment itself."); *La. ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961)("[F]reedom of association is included

in the bundle of First Amendment rights made applicable to the States"); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 178-79, (1951)(Douglas, J., concurring) (guilt by association is "one of the most odious institutions of history[.]"); *Bridges v. Wixon*, 326 U.S. 135, 163 (1945) Murphy, J., concurring) (opining prohibition against guilt by association is "one of the most fundamental principles of our jurisprudence" and "the very essence of the concept of freedom and due process of law [.]"). Section 71.01(d)'s language, as transported into Section 46.02, cannot be reconciled with this bedrock constitutional law.

The statutory language in 46.02 strikes even deeper into constitutional law. Anybody who is a member of any group falling within its definition is a presumptive criminal, his rights determined purely by his status as a member of an association disapproved by law enforcement. A law that leaves police to define the parameters of its own power, presumes guilt of law-abiding citizens, and inhibits a person's right to free association, is unconstitutional under the First and Fourteenth Amendments alone.

Appellant is a lawful handgun owner. He was arrested solely because of his membership in the Cossacks—a group spurned by law enforcement. By authorizing arrest and prosecution on the bare status of a handgun owner as member of a group, the statute deprives citizens their right to free association and due process of law. *Baird v. State Bar of Ariz.*, 401 U.S. 1, 9 (1971) (Stewart, J., concurring in judgment) ("[M]ere membership in an organization can never, by itself, be sufficient ground for a State's imposition of civil disabilities or criminal punishment"). Appellant is guilty of unlawfully carrying a handgun only because of his association with a group frowned upon by police. Accordingly, the statute violates the First and Fourteenth Amendments to the Constitution of the United States.

IV. Issue Four: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code is unconstitutionally overbroad on its face under the First and Fourteenth Amendments.

A statute violates the First Amendment if, in reaching constitutionally prohibitable activities, it also reaches "a substantial amount" of First Amendment protection. *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 494 (1981); *Bynum v. State*, 767 S.W.2d 769, 772 (Tex. Crim. App. 1989). Overbreadth analysis applies not only to free

speech, but also freedom of association. *Broadrick v. Oklahoma*, 413 U.S. 601, 612-613 (1973); *Elfbrandt v. Russell*, 384 US 11 (1966). When a statute reaches First Amendment freedoms, a "chilling effect" on those freedoms is enough to void the statute. *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965).

Appellant has already demonstrated under the previous two issues the prejudicial treatment an otherwise lawful handgun owner receives from law enforcement merely by being a member of a disfavored group. To avoid repetition, Appellant will not repeat, but will incorporate by reference, those freedom of association and guilt by association arguments. Here, Appellant will instead demonstrate under this issue how the statute reaches, like a drone to target, constitutionally protected free expression of every vehicular traveler who is also a member of any group singled out by police.

Appellant expresses his membership by wearing his cut (jacket or vest with the motorcycle club's insignia) while operating his motorcycle in much the same way a person may express himself with a bumper sticker or other logo. This advertisement constitutes content-based expression protected by the First Amendment. *Ex parte Thompson*, 442

S.W.3d 325, 345 (Tex. Crim. App. 2014)(holding a law is "content-based "[i]f it is necessary to look at the content of the speech in question to decide if the speaker violated the law"); *Martinez v. State*, 323 S.W.3d 493,497, 505 (Tex. Crim. App. 2010) (holding that "wearing clothes that particularly identify membership" in a group is content-based speech). Like the other First Amendment rights, statutes that affect speech are subject to strict scrutiny. *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000) (holding a statute regulating speech "must be narrowly tailored to promote a compelling Government interest" and "the legislature must use that alternative."); *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (holding that courts apply "most exacting scrutiny to regulations that suppress, disadvantage, or impose different burdens upon speech because of its content."). Content-based restrictions "have the constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat the Constitution demands that content-based restrictions on speech be presumed invalid, and that the Government bear the burden of showing their constitutionality[.]" *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004).

As a handgun owner, Appellant's right to identify and express himself as a member of a particular group is plainly inhibited by a statutory framework that subjects him to arrest the moment he informs an officer that he is carrying a weapon. A handgun owner may be treated as a free person only if he silences himself. Had Appellant been driving his car and concealed his association with his motorcycle club, he undoubtedly would not have been arrested.

As the Supreme Court has emphasized, overbreadth creates "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 432-433 (1963). This appeal underscores the truth of *Button's* observation. It is effectively illegal for a lawful handgun owner to express his affiliation with a group the State finds objectionable. How can a handgun owner be sure that three or more persons in his group are regularly engaging in criminal activity when he is not engaging in crim-

inal activity? This statute has the potential of chilling the speech of anyone associated with an organization with common leadership and identifying marks because an individual might never be sure when or whether his group might be classified as a criminal street gang. Because the statutory framework reaches not only the right to association but the core right to free expression as well, the statute is overly broad and should be declared unconstitutional under the First and Fourteenth Amendments.

V. Issue Five: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code violates on its face the fundamental right to travel under the Fourteenth Amendment's Due Process Clause.

VI. Issue Six: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code is unconstitutional on its face under the Second and Fourteenth Amendments.

Under the Fourteenth Amendment, traveling "is a part of the 'liberty' of which the citizen cannot be deprived without due process of law[.]" *Aptheker v. Sec'y of State*, 378 U.S. 500, 505-506 (1964)(quoting *Kent v. Dulles*, 357 U.S. 116, 127 (1958)). Under the Second Amendment, a person has the right to possess a handgun for self-protection, a "*central component* of the right itself." *District of Columbia v. Heller*, 554 U.S. 570, 592, 599 (2008) (emphasis in original). In light of these constitutional

rights, a handgun owner might celebrate them by traveling with his handgun in his own vehicle.

The Texas Legislature codified the Castle Doctrine and now equates a person's vehicle with his home—two of three "castles" where he is entitled by law to not merely carry his handgun, but to use it in lawful self-protection. Tex. Penal Code § 9.32(b)(1)(A) and (B). A handgun owner who does not engage in criminal activity might therefore conclude that his mere association with a group police have deemed to be "criminal" would hardly be enough to defeat all other written law addressing the right to carry a handgun in one's vehicle—but he would be wrong.

The Texas statute is not meaningfully distinguishable from the *Aptheker* statute. The statute in *Aptheker* explicitly criminalized any travel attempt by "any member of a Communist organization," regardless whether the traveler had any personal criminal intent. *Aptheker*, 378 U.S. at 510-511. The statute here criminalizes any travel by a citizen, otherwise lawfully carrying a handgun, who is a member of any disfavored group, regardless of any personal crime attributable to the traveler himself. The Supreme Court declared the Aptheker Act an unconstitutional infringement on the right to travel because it operated under the

invalid assumption that "all members shared" the "evil purposes" of "some members of the Communist Party[.]" *Aptheker* at 510-511. The statutory provisions at issue in this appeal do no less. They operate against any traveling handgun owner under a generalized presumption of guilt and specific assumption that the traveler shares the *mens rea* of some members of his disfavored group.

The statutory framework at issue in this appeal applies to any group and to all its members under the same presumption found to be unconstitutional under *Aptheker*. In this sense, it is a definition far broader than the statute in *Aptheker*, leaving it to law enforcement to identify any group, not merely communists. It is therefore unconstitutional under *Aptheker*.

If the weight of *Aptheker* alone was not enough to invalidate this statutory framework, *Heller* equates the constitutional right to carry with the constitutional "right of defense of one's person or house[.]" *Heller*, 554 U.S. at 586 (internal quotations and citations omitted). Texas passed a law that effectuated a lawful handgun owner's constitutional right to carry a handgun for defensive purposes, clarifying that the right

extends to one's own vehicle. Appellant, like Heller, has a Second Amendment right to carry his arms in his vehicle for defensive purposes.

The statute does not make it a crime for handgun owners to carry their guns at home or at the office. It is only when the handgun owner seeks to exercise his right to travel does it become a problem of constitutional magnitude. For no discernably good reason, lawful handgun owners, under this statutory framework, must choose between their right to travel and their right to carry, when law guaranteed both rights, including the right to exercise them simultaneously. *Shapiro v. Thompson*, 394 U.S. 618, 649 (1969), *overruled on other grounds*, *Edelman v. Jordan*, 415 U.S. 651 (1974) (recognizing under Aptheker, it is impermissible to impose a Hobson's choice and force a potential traveler to choose between his right to travel and his other constitutional rights). Under the Second Amendment's right to carry and the Fourteenth Amendment's right to travel, separately or in tandem, this Court should condemn the law that denies handgun owners their right to travel and to carry their handguns at the same time, as they are entitled to do under constitutional and statutory law.

VII. Issue Seven: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code is unconstitutionally vague on its face under the Fourteenth Amendment's Due Process Clause.

To remind how this language operates, "criminal street gang" is any identifiable group who has three or more misdemeanants. For example, even the Catholic Church each has three or more felons in its respective membership. Historically, many subsets of large groups have had unscrupulous members who participated in illegal schemes to advance its organization's interests without the involvement of the organization as a whole. It is hard to imagine any moderately-populated group not meeting the statute's sprawling reach.

The Due Process Clause of the Fourteenth Amendment condemns statutes which invite "arbitrary and discriminatory enforcement" of the law. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The statutory framework here could not be more directly offensive to this Due Process Clause protection. The State may pick and choose its "street gang" members at will. For all the same reasons this statutory framework offends the other constitutional rights discussed previously, it contravenes the Due Process Clause's vagueness doctrine, as well.

In the 1930s, New Jersey passed a statute that made it a crime to be a "gangster." *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). The Supreme Court found the provision to be unconstitutional because it "condemns no act or omission" and its terms "are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment." *Lanzetta*, 306 U.S. at 458. The statutory framework here condemns no act or omission and does not define the term "member"—it merely defines "criminal street gang." Otherwise lawful handgun owners are subject to arrest and prosecution if deemed to be "gangsters." There is no meaningful difference between the statute in *Lanzetta* and the statutory framework in this case.

Lawful handgun owners who are Rotarians, Lions, Catholics, Republicans, or Democrats may freely travel with their respective handguns under this law—or at least until law enforcement chooses to add any of these organizations to its gang database. Yet a sole "Cossack" with the same ownership privileges may not. State action could not be more arbitrary or its administration more cherry-picked. This statutory framework cannot co-exist with the Due Process Clause. *Cf. Smith v. Goguen*, 415 U.S. 566, 576 (1973) (holding statute which permits "selective law

enforcement" constitutes "a denial of due process."); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (holding law which "delegates basic policy matters to policemen" violates due process); *Papachristouv. City of Jacksonville*, 405 U.S. 156, 168 (1972) (holding a statute which places "unfettered discretion" in police hands offends due process). Accordingly, this Court should declare the statutory framework unconstitutional under the vagueness doctrine of the Due Process Clause.

"AS-APPLIED" ISSUES

VIII. Issue Eight: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code is unconstitutional as applied to Appellant under the Fourteenth Amendment's Equal Protection Clause.

IX. Issue Nine: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code is unconstitutional as applied to Appellant under the First and Fourteenth Amendments because it impairs his right to association.

X. Issue Ten: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code is unconstitutional as applied to Appellant under the First and Fourteenth Amendments because it authorizes state action against him based on the doctrine of guilt by association.

XI. Issue Eleven: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code is unconstitutionally overbroad as applied to Appellant under the First and Fourteenth Amendments.

XII. Issue Twelve: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code violates

Appellant's fundamental right to travel under the Fourteenth Amendment's Due Process Clause.

XIII. Issue Thirteen: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code as applied to Appellant violates his rights under the Second and Fourteenth Amendments.

XIV. Issue Fourteen: The statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code is unconstitutionally vague as applied to Appellant under the Fourteenth Amendment's Due Process Clause.

Even if this Court rejects all facial challenges to this statutory framework, Appellant argues that these statutory provisions are unconstitutional as applied to him. The statutory right at issue in this case is the right conferred to lawful handgun owners to carry their handguns in their vehicles. Applicant's right is not merely undermined, but fully denied. His conviction resulted in the taking of his weapon, and Appellant can longer own or possess a handgun so long as he continues to associate with his motorcycle club.

The State action at issue in this case began when Lubbock County Sheriff's Corporal Michael Macias observed Appellant pass him on Highway 87. (3 RR 14-15); State's Exhibit 1. The speed limit was 75 miles per hour. *Id.* Appellant's cut bearing the "Cossacks" insignia was plainly visible. State's Exhibit 1. Immediately upon pulling over Appellant, Corporal Macias asked Appellant to place his hands behind his head. State's

Exhibit 1. Corporal Macias can be seen wearing his own tactical vest emblazoned with "Sheriff" on both the front and back. When Corporal Macias asked Appellant if he had any weapons and Appellant stated he did, Corporal Macias immediately handcuffed Appellant. Without looking for a driver's license or handgun license, Corporal Macias stated Appellant was under arrest for unlawful carry, and even cited portions of the statute. State's Exhibit 1. Corporal Macias did not observe Appellant commit any crime. Corporal Macias was not aware at that moment whether Appellant had ever been involved in any criminal activity. Corporal Macias only saw one thing—a cut bearing the "Cossacks" insignia.

Appellant was somewhat familiar with this State action was familiar to Appellant because the Police had previously arrested Appellant in McLennan County for the engaging in organized crime in 2015, but those charges were dismissed. (3 RR 139-145; 6 RR 23); State's Exhibit 6. A later report from the Waco Police Department revealed that police ran a background check and did not find anything that would prohibit Appellant from legally possessing a handgun. (3 RR 142-45). The Waco Police Department returned Appellant's gun to him. (3 RR 146). Other than this police report, the State introduced no evidence of any prior conviction or

criminal activity involving Appellant. (5 RR 51-71). This demonstrates Appellant had a clean criminal record.

Following his trial and conviction under this unconstitutional statute, however, Appellant is now a convicted criminal solely because he belongs to a motorcycle club that has been classified as a "criminal street gang."

The facts before this Court demonstrate Appellant's diminished rights. His right to associate with his motorcycle club and right to express that affiliation has been more than chilled. Overly broad, the statute acted as a magnet for police and a justification to disarm and arrest him, depending on the whim of the State. The statutory framework defeated his First Amendment freedoms of association and expression and made the exercise of his right to travel a more than risky undertaking, despite the fact that Appellant had done nothing more than breach traffic infractions. He plainly has no right to possess his handgun (violative of the Second Amendment) when he travels on his bike. No otherwise lawful handgun owners are so abusively treated in violation of the Equal Protection Clause. It is all justified by a statutory framework that authorized his guilt by association, a policy the State is fundamentally forbidden to

enforce. At least Appellant received some relief in that the jury, abiding by the letter of the law in convicting Appellant, only assessed punishment at zero days confinement within the spirit of the law.

Nevertheless, this statute as applied has significantly infringed on the constitutional rights of a citizen who has committed no other crime in his life other than carrying a handgun while simultaneously being the member of a motorcycle club he only discovered was considered "a criminal street gang" upon his arrest. As such, this judgment cannot stand.

XV. Issue Fifteen: Even applying the erroneous statutory interpretation by *Ex Parte Flores*, the evidence is legally insufficient to support Appellant was one of the members or persons who regularly or continuously engaged in criminal activity.

In assessing the legal sufficiency of the evidence, the Court considers the evidence in the light most favorable to the verdict and determines whether, based on that evidence and reasonable inferences therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007); *see also Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979).

The Court determines whether the inferences necessary to sustain conviction are reasonable after reviewing "the combined and cumulative

force of all the evidence"—direct or circumstantial, properly or improperly admitted—as "viewed in the light most favorable to the verdict." *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). Where evidence supports conflicting inferences, the court "presume[s] the jury resolved any conflicts in favor of the State." *Id.*

Assuming, arguendo, that *Ex Parte Flores* does apply, no evidence showed Appellant regularly engaged in criminal activity as one of the three persons described in section 71.01(d). The only evidence that Appellant had ever been entangled with law enforcement in any way was a report showing the Waco Police Department arrested Appellant in McLennan County for the engaging in organized crime in 2015. (3 RR 139-145; 6 RR 23); State's Exhibit 6. These charges were dismissed. (3 RR 139-145). A later report from the Waco Police Department revealed that police ran a background check and did not find anything that would prohibit Appellant from legally possessing a handgun. (3 RR 142-45). The Waco Police Department returned Appellant's gun to him. (3 RR 146). Other than this police report, the State introduced no evidence of any prior conviction or criminal activity involving Appellant. (5 RR 51-71).

Appellant, in fact, had no criminal record. This evidence is legally insufficient to show that Appellant himself regularly or continuously engaged in criminal activity pursuant to his membership in a gang. As such, the judgment is contrary to the law and evidence.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays that this Court reverse the trial court's judgment and dismiss the information or reverse the trial court's judgment and remand the case to the trial court to grant relief by dismissing the information. Tex. R. App. P. 43.2(d) & (e).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

On December 2, 2019, I filed this brief through the e–filing system. Opposing Counsel has therefore been served. Appellant has also been served via email at tsmartin41@gmail.com.

/s/ Lorna L. McMillion
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I, Lorna McMillion, attorney for Appellant, certify that this document was generated by a computer using Microsoft Word in Century Schoolbook 14–point font, and that such word processing program indicates that the word count of this document is 7,249 words, not counting the caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix. Tex. R. App. P. 9.4(i).

/s/ Lorna L. McMillion
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